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IN THE

Supreme Court of the United States

October Term, 1959

No. 847

EDMUND MILTON JAMES, alias EDDIE JAMES, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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CApital 2-2701 — Review Publishing Co., 141 E. 5th St., St. Paul 1, Minn. — CApital 2-2701

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Petitioner prays that a Writ of Certiorarri issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on March 10, 1960.

CITATION TO OPINIONS BELOW

The District Court did not prepare a written opinion or memorandum of this case. The opinion of the Court of Appeals for the Eighth Circuit, printed as Appendix A hereto, is as yet unreported.

JURISDICTION

The judgment of the Court of Appeals dated and entered on March 10, 1960 is printed as Appendix B hereto. Upon Motion of petitioner an order staying the issuance of the mandate was entered by the Court of Appeals on March 25, 1960, staying the mandate for a period of thirty (30) days from the date thereof. The jurisdiction of this court is invoked under Title 28 U.S.C.A., Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether a person accused of criminal contempt, the alleged acts of which contempt also constitute a criminal offense is entitled to a jury trial, upon proper demand, under the Constitution of the United States.

2. Whether a person accused of criminal contempt, the alleged acts of which also constitute a criminal offense is entitled to a jury trial under Title 18, U.S.C.A., 3691.

3. Whether the trial court abused its authority and discretion in exercising its criminal contempt power without first having considered the feasibility of the alternatives at hand.

4. Whether petitioner's conviction for criminal contempt can be sustained in the absence of any competent evidence establishing guilt beyond a reasonable doubt.

5. Whether the sentence imposed on petitioner is grossly excessive and constitutes an abuse of discretion by the trial court.

STATUTES INVOLVED

Title 18, U.S.C.A., 3691

"3691. Jury Trial of Criminal Contempts.

Whenever a contempt charged shall consist in willful disobedience of any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing or omitting any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to trial by a jury which shall conform as near as may be to the practice in other criminal cases.

This section shall not apply to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States. June 25, 1948, c. 645, 62 Stat. 844."

STATEMENT OF THE CASE

On June 11, 1959, the United States District Court for the District of Minnesota entered a judgment and commitment finding the petitioner guilty of contempt of court. The court imposed a punishment of imprisonment for a period of eighteen (18) months. A seasonable appeal was perfected to the United States Court of Appeals for the Eighth Circuit. That court on March 10, 1960, rendered its decision affirming the judgment of the District Court. (Appendix A, infra).

The contempt proceeding had its origin in the trial of the case of United States of America, plaintiff v. Rocco Salvatore

Lupino, defendant. The Lupino case was pending for trial in the United States District Court for the District of Minnesota, Fourth Division, between the 10th day of September, 1958 and the 24th day of October, 1958. (T. 41-43).[1]

On or about September 11, 1958 a subpoena was issued in said case directed to be served on Eddie James. (Government's Exhibit No. 3, R. 24).[2]

It is undisputed that petitioner did not appear at the Lupino trial. (T. 63-65, 158-159). Further it is undisputed that the respondent at no time throughout the Lupino trial called out petitioner's name or requested that he testify in the case. (T. 68).

Petitioner testified that he was not served with said subpoena. (T. 143). To petitioner's knowledge he had no information which would aid the government in the Lupino case. (T. 157, 167). He had no motive or reason to disobey a subpoena duly served on him. He did not in any way attempt to avoid a proper service. (T. 156, 167).

It is claimed by respondent that said subpoena was duly served on Eddie James on September 20, 1958 by John A. Mortenson, a Deputy United States Marshal. (T. 29-39, 49-50). Mortenson testified that he had a brief acquaintance with James some seventeen (17) years ago and had not seen him since that time. (T. 27, 28). He further testified that on the night he served James he recognized him although he had not seen him for seventeen (17) years despite the

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[1] T refers to the certified transcript of proceedings prepared by Earl G. Anderson, court reporter for the Honorable Edward J. Devitt.

[2] R refers to the certified record on appeal, referring to the original papers consecutively paged, forwarded by the clerk of the United States District Court for the District of Minnesota to the Court of Appeals.

fact that the man he served denied he was James. (T. 34-36, 80, 99, 133). It is undisputed that Eddie James and Harold Nevers are similar in appearance and have frequently been mistaken for each other. (T. 46, 162).

It is further claimed by respondent that Eddie James did fail to obey said subpoena and did conspire with Harold Nevers and agree with him that Nevers would appear and falsely claim that he, Nevers, was the person served with said subpoena. (R. 44. Harold Nevers was convicted with James in the District Court. His case was appealed with the James case to the United States Court of Appeals for the Eighth Circuit. Both cases were argued and decided together. The court dismissed the Nevers' appeal for the reason that Nevers had completed the service of the six (6) months' sentence imposed upon him. The court held that there was no longer a subject matter on which the decision of the court could operate. (Appendix A, infra, p. 16).

It is claimed by Nevers that he was the person served with said subpoena (T. 80, 82) and that he answered said subpoena on the date required. On the day after the service of the subpoena Nevers went to the United States Attorney's Office and told them that he was served with the subpoena and that he was not Eddie James, the person named therein. (T. 82-85).

Without the testimony of petitioner, on October 24, 1958, trial in the case of United States of America v. Rocco Salvatore Lupino was completed and the defendant was convicted as charged. (T. 41-43).

The United States Attorney's Office did nothing after they learned of the disputed service. They did not attempt to properly serve the subpoena on James despite the fact that he was available at all times for such service. (T. 156).

Some five (5) months later, on March 24, 1959, pursuant to Rule 42b and Rule 17g of the Federal Rules of Criminal Procedure, an Order to Show Cause was issued ordering James and Nevers to show cause why they should not be adjudged in contempt of court for committing acts within Title 18, U.S.C.A. 401(3). (R. 4). Hearings were had pursuant to said Order on March 31, 1959, April 2, 1959 and April 3, 1959. On April 15, 1959 the Court made its Findings of Fact and Conclusion of Law. (R. 27). Pursuant to a Motion by petitioner and Nevers, (R. 34), the court heard additional testimony and at the conclusion of this hearing James and Nevers were sentenced to imprisonment for eighteen (18) months and six (6) months respectively. Both cases were then appealed to the United States Court of Appeals for the Eighth Circuit.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the language in the case of *DeParcq v. United States District Court for Southern District of Iowa*, 235 F. 2d 692, and the case of *Matusow v. United States*, 229 F. 2d 335, and decides an important question of Federal law upon which previous cases are inconclusive concerning the question of the constitutional right to a jury trial in criminal contempt cases.

The Court of Appeals held that petitioner was not entitled to a jury trial. It cited for its authority *Green v. United States*, 356 U.S. 165, 183; *United States v. United Mine Workers*, 330 U.S. 258, 298; *Ex Parte Hudgings*, 249 U.S. 378, 383; *Michaelson v. United States*, 226 U.S. 42, 67.

The language referred to by the lower court in the Hudgings case, supra, and the Michaelson case, supra, is dicta. The issue of the constitutional right to a jury trial was not raised, preserved, or argued by counsel. In the United Mine Workers case, supra, the jury trial was urged under the Norris-LaGuardia Act. It was held that this Act did not apply.

In the Green case, supra, p. 187, the issue was again not properly raised. Nevertheless, the court discussed the problem with the result that there was a sharp difference of opinion within this court. The reasons underlying the argument on both sides are clearly presented and argued at length. It is the contention of the petitioner that these two positions should be considered in this case in which the issue is properly before the court and a decision rendered which reflects the correct constitutional intent. Such a decision would be a proper guide for all Federal courts in the future. The dissenting opinion of Mr. Justice Black with whom the Chief Justice and Mr. Justice Douglass concurred is so well reasoned and forceful, that in the interest of justice it should be reconsidered by the entire court.

The uncertainty of the law in regard to this problem was noted in *Matusow v. United States*, 229 F. 2d 335, 346.

> "On principal there would seem to be no sound reason why appellant would not be entitled to a jury trial, and much of the language of the cases cited in this opinion sustain appellant's argument; but the Supreme Court has not yet ruled authoritatively on the question."

This is a proper case for this court to "rule authoritatively on the question".

In the Eighth Circuit the court is apparently not aware of the correct rule. The court, through its Chief Judge, Archibald K. Gardner, states in *DeParcq v. United States District Court for Southern District of Iowa*, 235 F. 2d 692, 699:

> "But if it be contended that the proceeding is for criminal contempt it need only be suggested that in such a proceeding there can be no summary punishment and the contemnor is entitled to all the normal safeguards surrounding criminal prosecutions, including trial by jury."

This language was disregarded and avoided in deciding petitioner's case although it was cited in petitioner's brief. (Appendix A, infra). The lower court not only failed to follow the rule laid down by its own court, but it failed to cite any authoritative case controlling its decision.

The petitioner has demanded a jury trial and has properly preserved the record. The evidence relied upon by the trial court to convict petitioner and the sentence imposed, illustrate the need for the application of the constitutional right to a jury trial. This is an important question of Federal constitutional law which should be settled by this court. The decision should be rendered in a case in which the issue is properly raised and argued.

2. The lower court improperly construed Title 18, U.S.C.A. 3691 in denying a jury trial pursuant to it.

This statute is ambiguous and as such should be construed in favor of petitioner and in restriction of the extraordinary power of the court to try persons for contempt summarily. *Green v. United States*, supra. The two paragraphs of the

statute are inconsistent and conflicting. The first sentence of paragraph 1 is obviously limiting the application of the statute to contempts under Title 18, U.S.C.A. 401(3) to the exclusion of sub-sections 1 and 2 of 401. The further limitation is also imposed that the act must also constitute a criminal offense. Finally, a proper demand for a trial by jury must be made. The lower court held that this case meets all the above requirements. (Appendix A, infra, p. 23).

The inconsistency is apparent when the second paragraph is applied in conjunction with the first. In construing the statute the lower court held that because the subpoena was issued in a case prosecuted by the United States, the petitioner was not entitled to a jury trial. It is contended by the petitioner that this is an erroneous statutory construction which will bring about results never contemplated by Congress in the enactment of this statute. A proper construction would be that a jury trial is not required if the subpoena was issued in a case prosecuted by the United States only if the act doesn't also constitute a criminal offense. In other words, the controlling criteria is whether or not the act constitutes a criminal offense. If it does, a jury trial may be demanded.

Under the construction of the lower court a defendant could commit an act which was both a criminal offense under an Act of Congress or under a state law and also a criminal contempt. The Government could then decide whether or not it would give the defendant a jury trial. If the Government decided to try the man without a jury it would proceed on a criminal contempt charge. The possible punishment would have no bearing because conceivably a larger sentence could be imposed upon conviction for criminal contempt than for conviction of the crime. There would

be no maximum limit on the contempt charge. *Green v. United States*, supra, at 207, 208, 209.

This statute should be construed by this court. It is an important and doubtful question upon which this court has not decided.

3. The trial court abused its authority and discretion in exercising its criminal contempt power without first having considered the feasibility of the alternatives at hand.

The rule laid down by this court is clearly stated in *Brown v. United States*, 356 U.S. 148 at 163.

> "This Court has recognized that the criminal-contempt power should be limited in its exercise to 'the least possible power adequate to the end proposed'. Re: Michael, supra (326 U.S. at 227). The 'end proposed', it should be clear, is not to impose vengeance for an insult to the court whose decree has been flouted, but to aid the fair and orderly administration of justice by deterring non-compliance with the court's lawful, order * * * there is a duty on the part of the district judges not to exercise the criminal-contempt power without first having considered the feasibility of the alternatives at hand."

The United States Attorney's Office had ample time and opportunity to make a proper service on petitioner if they felt his testimony was needed in the Lupino case. When the disputed service was brought to their attention they did nothing. A logical inference to be drawn is that they planned and hoped that James would not appear so that he could be prosecuted. In any event, it shows a lack of good faith and attendance to duty when nothing was done.

The rule quoted above was totally disregarded. No alternatives were even considered and the criminal contempt power of the court was solely relied on.

This type of procedure is improper and does not promote the ends of justice. This court should enforce the rule cited in the Brown case, supra. The trial court departed from what would be an accepted judicial procedure. The appellate court sanctioned it by rendering an affirming decision. When the trial court abuses its discretion, this court should and must correct the abuse. *Ex Parte William F. Hudgings*, supra.

4. There was a complete absence of competent evidence to sustain the conviction for contempt.

The court below recognized the rule that in criminal contempt proceedings the defendant is presumed to be innocent and that guilt can be found only on proof beyond a reasonable doubt. (Appendix A, infra, p. 20). The court failed to find any competent evidence from which it could be concluded beyond a reasonable doubt that the subpoena was properly served upon petitioner. Indeed, there was no such competent evidence.

The critical fact issue in this case is whether Deputy Marshal Mortenson served James or Nevers with the subpoena. It was the respondent's burden to prove beyond a reasonable doubt that James was served. This they attempted to do by the testimony of Mortenson. He testified that he served James on September 20, 1958, at Jack's Cafe. This statement in the mind of Mortenson is undoubtedly true. Nevertheless, he was the victim of a case of mistaken identity. Mortenson based his testimony as to the identity of the man

he served on a limited association with James some seventeen years prior to the time he allegedly served him. During that seventeen-year interval he had never again seen James. Despite these facts, Mortenson testified that he recognized James:

The competency of this evidence must be viewed along with the following facts: *a*) At the time Mortenson allegedly served James, the person he served denied that he was James and pointed out the mistaken identity, *b*) James testified he was not served, *c*) Nevers testified he was served, *d*) other witnesses to some extent corroborated the testimony of James and Nevers, *e*) James and Nevers are similar in appearance and are frequently mistaken for each other by persons with whom they are well acquainted much less someone who had not seen James in seventeen years and had never seen Nevers, and *f*) there was absolutely no motive and nothing to be gained by James in disobeying the subpoena if he was served. He could have been properly served at any time after Nevers had reported the improper service to the United States Attorney's Office.

Thus, there was a complete failure of proof beyond a reasonable doubt that petitioner was guilty of contempt as charged in the Order to Show Cause. That failure of proof is an important issue meriting the consideration of this Court. Particularly is such consideration appropriate where, as here, the court below has apparently based its conviction upon the previous criminal record of the petitioner and guilt by association and not on competent evidence meeting the legal burden of proof. The attitude of the trial court, based on his personal dislike for petitioner and his associates, amply shown by the court's vigorous cross-examination of both James and Nevers, served to remove from the peti-

tioner the presumption of innocence and make it unnecessary for the Government to prove the essential elements of the offense beyond a reasonable doubt.

The facts and issues in these respects were properly presented and urged by petitioner in the court below. Its failure to respond to those facts and issues made a useless formality out of the appellate review. Here again, the supervisory powers of this court must be invoked in order that petitioner may secure the proper appellate review of his conviction to which he is entitled.

5. The sentence imposed on petitioner is grossly excessive and constitutes an abuse of discretion by the court.

In no similar reported contempt case has such a long sentence been imposed or sustained. See *Yates v. United States*, 352 U.S. 385 (one year and one day vacated for resentencing, resentence imposed of fifty days); *Sacher v. United States*, 343 U.S. 11 (ten days reduced by Court of Appeals to fifty-eight hours); *Nye v. United States*, 313 U.S. 33 ($500.00 fine); *Brown v. United States*, 356 U.S. 148 (six months).

The Appellate Court below recognized the special responsibilities of the court in imposing sentences in a case of this type, then it failed to apply the rule. (Appendix A, infra, p. 25).

The analogies used by the Appellate Court below to justify this sentence are not proper or logical. The court relied on the case of *Green v. United States*, supra. (Appendix A, infra, p. 25). The facts in that case are so dissimilar to the facts here, that it has no application. The acts and con-

sequences of the acts committed in that case were far more serious than here. The harm done, if any, resulting from petitioner's alleged acts could easily have been prevented by the U.S. District Attorney. This situation did not exist in the Green case.

It is apparent that the sentence imposed on petitioner was not based on what he allegedly did nor the consequences of his acts, instead it was based on his previous criminal record and the trial court's personal feeling toward the petitioner. The Appellate Court failed to correct this abuse.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted,

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April 6, 1960

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16,341

EDMUND MILTON JAMES, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*.	Appeal from the United States District Court for the District of Minnesota.

No. 16,355

HAROLD NEVERS, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*.	Appeal from the United States District Court for the District of Minnesota.

[March 10, 1960]

Before JOHNSEN, Chief Judge; and VAN OOSTERHOUT and MATTHES, Circuit Judges.

MATTHES, Circuit Judge.

In this criminal contempt proceeding, the request of appellants Edmund Milton James and Harold Nevers for a jury trial was denied, they were tried by the court and found guilty. Pursuant to the power vested by Title 18 U.S.C.A. §401, James was sentenced to imprisonment for 18 months and Nevers for 6 months, and judgments of conviction were entered by the trial court on June 11, 1959. A seasonable appeal was perfected by both James and Nevers, and the appeals were set for hearing on November 20, 1959. At the request of counsel for both appellants, with no objection by the United States, the cases were passed to the next session of court, beginning March 2, 1960; however, on this Court's initiative, they were given a special setting on January 25, 1960, at which time arguments were heard. The parties requested and were granted leave to file supplemental briefs, and the last brief was filed on February 12, 1960.

When the judgments were entered on June 11, 1959, the Court ordered that defendants be permitted to remain at large on the existing appearance bonds and until appeal bonds could be obtained. Apparently Nevers was enlarged on bail until October 1, 1959, when, for reasons not appearing in the record, he entered upon the service of the sentence imposed upon him. It now appears to our satisfaction that he has fully completed service of the six months sentence and has been discharged from custody. In light of this circumstance, as to Nevers, there is no longer a subject matter on which the decision of this Court could operate and there is no showing that Nevers is liable to suffer "collateral legal disadvantages in the future" by reason of his

conviction.[1] See and compare, *St. Pierre v. United States*, 319 U.S. 41; *Pollard v. United States*, 352 U.S. 354, 358; *Fiswick v. United States*, 329 U.S. 211, 220; *United States v. Morgan*, 346 U.S. 502, 512-513. The appeal in the Nevers case, No. 16,355, is dismissed, and our consideration of the contentions presented shall necessarily be limited to and have effect only upon case No. 16,341, the appeal of James, who is still enlarged on bail.

Section 401, Title 18 U.S.C.A. which empowers the courts to punish for contempt, provides:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> "(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> "(2) Misbehavior of any of its officers in their official transactions;
>
> "(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

On March 24, 1959, pursuant to the procedural provisions of Rule 42(b) of the Rules of Criminal Procedure, and Rule 17(g), Federal Rules of Criminal Procedure, the United States Attorney for the District of Minnesota applied to the United States District Court for a notice and order to show cause why James and Nevers should not be adjudged in contempt of court. The application, alleging conduct within the ambit of §401(3), charged in essence that on September 20, 1958, James was duly served with a subpoena, theretofore issued by the United States District Court for the

[1] Nevers testified to four past convictions of felonies—breaking and entering on two occasions; driving automobile without owner's consent, and Dyer Act.

District of Minnesota, commanding him to appear as a witness in the criminal case of *United States of America v. Rocco Salvatore Lupino;* that on October 1, 1958, the trial of that case commenced and continued to and including October 24, 1958; and that James, willfully, knowingly, and intentionally and without adequate excuse, did fail to obey said subpoena and failed to appear at any time at the trial of the *Lupino* case. Formal order to show cause was issued by the Court, with service upon James and Nevers and hearing was had, resulting in convictions as aforesaid.

Since James admittedly did not appear at the trial, the pivotal factual issue is whether the subpoena was served upon James, as the Government contends, or upon Nevers, which was James' primary and chief defense to the order to show cause issued herein.

To support and establish the Government's position, John A. Mortenson, who has been a deputy United States Marshal in the Minnesota District since January 15, 1940, testified positively and unequivocally that he served the subpoena on James in his place of business, Jack's Cafe, at approximately 8:20 p.m. on Saturday, September 20, 1958. In 1942, Mortenson had James in custody, and took him from the Ramsey County jail to the United States Commissioner's office for arraignment. Later, in connection with the same offense, James as a convicted prisoner, was transported by Mortenson to the federal prison at Leavenworth, Kansas. From these contacts, Mortenson testified that he knew and recognized James on the evening of September 20, 1958. Mortenson stated that he arrived at Jack's Cafe at approximately 8:10 p.m. and took a seat at the bar until James entered the tavern a short time later. Although he recognized James when he entered, Mortenson nevertheless and in accordance

with his custom of "double-checking," inquired of the bartender, "That's Mr. James?", and upon receiving an affirmative answer, proceeded to where James was seated, identified himself as a deputy United States Marshal, and stated, "I have a subpoena for you." When James turned away, Mortenson touched James' hand with the subpoena and then laid it on the bar in front of him. Almost immediately James called the bartender and handed the subpoena to him; the bartender in turn brought it to Mortenson, stating "he didn't want this." It should here be observed that the manner of service of the subpoena is not in issue.

The trial court had before it official records of the office of the United States Marshal which fully substantiated Mortenson's testimony. The original of the subpoena, with the return endorsed on it, showed service on James on September 20, 1958, at 253 W. 7th Street, St. Paul, Minnesota, by delivering a copy to him [this return was filed in the official court records on September 24, 1958]; the "Deputy's Daily Log," prepared by Mortenson, reflected in detail his official activities on Saturday, September 20, 1958. This record shows that Mortenson arrived at 253 W. 7th Street at 8:10 p.m., that a subpoena was served on James, and that Mortenson departed from that address at 8:20 p.m.

James' theory was and is that this is a case of mistaken identity on the part of Mortenson, who mistook Nevers for James. Nevers testified that the subpoena was served on *him* in Jack's Cafe, under the same circumstances and at the same hour testified to by Mortenson, but on a different date, 11 days later. According to Nevers, the service was effected during the middle of the week, apparently on the evening of Wednesday, October 1, not September 20, 1958. In this connection Nevers testified that on the morning fol-

lowing receipt of the subpoena, he appeared at the office of the United States District Attorney in the Court House in Minneapolis where he informed Assistant United States Attorney, Mr. Clifford Janes, that the subpoena had been erroneously served on him. The record maintained by the United States Attorney's office disclosed that it was on October 2, 1958, that Nevers appeared in that office.

James testified that he was never served with a subpoena in the *Lupino* case. Additionally, Mr. and Mrs. Roscoe McDonald testified that they were present in Jack's Cafe and witnessed a paper being handed to Nevers by another individual. Although they were unable to fix a month, or date, they too stated this event occurred during the middle of the week, because there were few customers in the bar.

This testimony was heard on April 2 and 3, 1959 and on May 15, 1959, the Court entered its order finding James in contempt for willful disobedience of the subpoena.

Upon motion to vacate order or for a new trial upon ground of newly discovered evidence, a second hearing was held on June 11, 1959, to take evidence of George Russell, the bartender, and one Gerald Driscoll, who claimed to have been with Nevers at the time he was served with the subpoena. On that same date, the Court reaffirmed its original findings and proceeded with sentencing.

Appellant James first urges that the evidence fails to support his conviction. In a criminal contempt proceeding the accused is clothed with the presumption of innocence, and the Government has the burden of proving the guilt of the alleged contemnor beyond a reasonable doubt. *Michaelson v. United States*, 266 U.S. 42, 66; *Green v. United States*, 356 U.S. 165, 173-179; *United States v. Hall*, 2 Cir., 198 F. 2d 726, 730, cert. den. 345 U.S. 905; *Richardson v. United*

States, opinion filed December 29, 1959, 8 Cir., F. 2d . We are not persuaded by the argument that the evidence fails to meet the foregoing test. To say that there was evidence from which the Court could have found that the subpoena was not served on James, is merely stating the obvious. But it is equally evident that the trial judge did not believe, and was not required to believe, defendants or their supporting witnesses. *Richardson v. United States*, 8 Cir., F. 2d [Dec. 29, 1959]. All of the evidence was subject to appraisal by the judge. It is almost trite to observe that he was in a far better position than we to observe the demeanor of the witnesses as they testified. As stated by the Supreme Court in *Nilva v. United States*, 352 U.S. 385, at p. 395: "It (the District Court) was the judge of his credibility and of the weight to be given his testimony."

From the trial judge's comments it is apparent he gave little credence to defendants' version of the circumstances. James and Nevers had each been convicted four times of felonies--witness Makiesky was an officer in the corporation holding the liquor license for "Jack's Cafe"; witness McDonald was a one-time felon and had worked for Makiesky; Mrs. McDonald was a former employee of Jack's Cafe; witness Driscoll, who testified he observed service on Nevers and was very sure it was on a Wednesday, had been twice convicted, and it appears that he had social and business connections with the principals in the *Lupino* trial. In addition, the trial court observed that on occasion, witnesses had been deliberately evasive, and, for purposes of skirting perjury, "were very careful . . . to make sure they didn't give any positiveness to their statements."

Opposed to this type of testimony, the Court had before it the unequivocal testimony of Mortenson, the return ap-

pearing on the subpoena, and the deputy's daily log, which have received our scrutiny. In addition, we find some further corroboration of the circumstances surrounding the service in the testimony of George Russell, the bartender. The foregoing evidence, coupled with the vulnerability of defendants' version of the controverted incident, furnished substantial basis for the trial court's finding that the subpoena was in fact served on James on September 20, and well bears out the trial court's observation that defendants and their witnesses "have kind of a community of interest, it's a cabal, looks to me like a little bit of a cabal; and it's not unlikely that the story of this alleged incident that took place with Nevers in the bar on a Tuesday is a cooked-up proposition."

Upon due consideration of the whole record, we are convinced that the trial court was completely justified in finding beyond a reasonable doubt that the subpoena was served upon James and that he willfully disobeyed the command to appear as witness in the *Lupino* trial.

Also urged upon us is the assignment that James was entitled to a jury trial, and that the court erred in denying his request therefor. Cited and quoted verbatim in defendants' brief is Rule 42 of the Rules of Criminal Procedure which deals with criminal contempt. We do not understand that this rule constitutes the authority for federal courts to punish for contempt, rather, this rule sets out procedure in contempt proceedings by providing inter alia that the defendant is entitled to a trial by jury "*in any case in which an Act of Congress so provides.*" (Emphasis added.)

The power or jurisdiction of a court of the United States to punish for contempt of its authority has been expressly circumscribed by Congress in order to avoid circumvention of constitutional guaranties through the means of contempt

proceedings.[2] Thus Title 18 U.S.C.A. §401 limits power to punish for contempt to three types of misbehavior. We have seen that the conduct of James falls within subsection three of that statute, and that the trial court rightfully exercised its power of punishment. Closely allied to §401 is §3691 of the same title, which grants to the accused contemnor the right of trial by jury when the conduct charged is that of willful disobedience of any lawful writ, process, etc., of any United States Court, and such conduct *also* constitutes a *criminal offense* under federal or state law.[3] However, the second paragraph of §3691 provides:

> "*This section shall not apply* to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States." (Emphasis added.)

Thus, by the clear language of the statute, James was not entitled to a jury trial under §3691 since his contempt was in disobedience of an order entered in an action prosecuted in the name of the United States. See *Forrest v. United States*, 9 Cir., 277 F. 873, 876, cert. denied 258 U.S. 629, and compare, *Green v. United States*, 356 U.S. 165, 180.

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[2] For discussion of history and purpose of §401 and §3691, see *Green* v. *United States*, 356 U.S. 165, 168-173; *Cammer* v. *United States*, 350 U.S. 399, 403-404; *Nye* v. *United States*, 313 U.S. 33, 45-52.

[3] We shall assume, for the purposes of this discussion, that James' disobedience of the subpoena could have been prosecuted criminally under 18 U.S.C.A. §1503, as conspiracy to obstruct justice. Obviously if James' conduct could not have been prosecuted criminally, he would have no standing to demand a jury trial.

Neither was James entitled to have a jury pass upon his guilt as of right, under the Constitution. This question was the subject of consideration by the Supreme Court in *Green v. United States*, 356 U.S. 165, at p. 183, where Mr. Justice Harlan, speaking for the majority, in resolving the pleaded right under the Fifth Amendment, stated: "The statements of this Court in a long and unbroken line of decisions involving contempts ranging from misbehavior in court to disobedience of court orders establish beyond peradventure that criminal contempts are not subject to jury trial as a matter of constitutional right."[4]

Finally, it is contended that the sentence imposed on James is beyond the power of the Court, that it is grossly excessive, and constitutes an abuse of discretion by the trial court. In the first instance, James charges that the trial court was limited in its sentencing powers by §402 of Title 18, and that the maximum sentence which could be imposed under that section was a term of six months imprisonment. Section 402 does so limit the sentence to be imposed for willful disobedience of the court's process, when such disobedience is also a criminal offense, but §402 contains the identical language of §3691 which excepts from its operation contempt of process in an action prosecuted in the name of the United States. See *Green v. United States*, 356 U.S. 165, 180. In this circumstance, we turn again to §401, to find that the court has power "to punish * * * *at its discretion* * * *." (Emphasis added.)

[4] It is clear that contemnors have no constitutional right to jury trial under Article III, §2, The Fifth Amendment, or the Sixth Amendment. See, *United States v. United Mine Workers*, 330 U.S. 258, 298; *Ex Parte Hudgings*, 249 U.S. 378, 383; *Michaelson v. United States*, 266 U.S. 42, 67.

We approach this question mindful that where Congress has not imposed limitations on the sentencing power that "the district courts have a special duty to exercise such an extraordinary power with the utmost sense of responsibility and circumspection," *Green v. United States*, 356 U.S. at p. 188, and that we, as an appellate court, have "a special responsibility for determining that the power is not abused." Ibid.

In light of this admonition, we have given careful consideration to the argument advanced in support of the contention of the excessiveness of the sentence, and have been driven to the conclusion that the discretion vested in the trial court was not abused.

The contempt here was, by any criterion, test or yardstick, wanton, nefarious and reprehensible. This record warrants the clear inference that the disobedience by James was the result of a deliberate plan and scheme designed to defy and frustrate the authority of the Court. As stated by the Supreme Court in *United States v. United Mine Workers*, 330 U.S. at p. 303: "The interests of orderly government demand that respect and compliance be given to orders issued by courts possessed of jurisdiction of persons and subject matter. One who defies the public authority and willfully refuses his obedience, does so at his peril." Furthermore, the sentence was well within the five-year criminal penalty provided under 18 U.S.C.A. §1503. Compare, *Green v. United States*, supra, at p. 189.

Regardless of whether the disobedience by defendant James, under the circumstances shown, constituted a contempt embraced by §401 or §402, because the act also constituted a criminal offense, the fact remains that by the

clear terms of the applicable statutes, James was not entitled to a jury trial, and the Court was not restricted by the sentencing limits of §402. The appeal of defendant Harold Nevers, No. 16,355, is dismissed, the judgment as to defendant James, No. 16,341, is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16,341

September Term, 1959

EDMUND MILTON JAMES, *Appellant*,

vs.

UNITED STATES OF AMERICA.

Appeal from the United States District Court
for the District of Minnesota

This cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence

of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further ordered by this Court that the defendant in the said District Court, Edmund Milton James, do surrender himself to the custody of the United States Marshal for the District of Minnesota, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the said District Court.

March 10th, 1960.